which included the words "imported by Soo Seng & Co. Penang". In addition, paragraph 18 of the respondent's affidavit, which was not contradicted by the appellants, reads as follows:—

"I say that the applicants herein have given me no warning that they would be taking the proceedings herein."

The first challenge to this registration has therefore been brought nearly two years after the agreement was executed and six months after the notice from the respondent purporting to dissolve the agreement. This course of conduct clearly shows acquiescence by the appellants in the registration of the trade mark in the name of the respondent and confirms the conclusion I have arrived at as to the interpretation of the agreement.

I have not overlooked what was referred to as the concessionaire's agreement, which was exhibited. This was an agreement between Maha Syndicate and one Sharikat Enchum Nasution appointing the latter sole distributor of this sweetened condensed milk for the State of Selangor. It is executed by all the partners. In the first recital, the Maha Syndicate is described as "the sole distributors" of sweetened condensed milk marketed under this trade mark, and there are references in the agreement providing for the protection of the trade mark, including an undertaking by the syndicate to "pay for and take all steps necessary" to protect the use of the trade mark. However, there is no direct reference to ownership of the trade mark and I do not consider that these references, for the most part inserted to protect a trade mark which the partnership was entitled to use, affect the conclusion I have drawn from the conduct of the parties as to the right to be registered as a proprietor.

It is appreciated that section 20(1) of the Partnership Act, 1890, may well affect many items that are not specifically referred to in the partnership agreement, but this provision cannot operate so as to defeat the true meaning of the agreement. It is clear from section 19 of the Act that the mutual rights of partners are to be determined in the first place by the terms of their agreement. Where these terms do not settle the matter, then reference may be made to the rules enunciated in the Act. On this subject, *Lindley* (12th Edition) at page 359 has these observations:—

"Agreement the test.

It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. Upon this subject there have been many decisions which will be alluded to hereafter, but the principal rules which may be deduced from the cases are now incorporated in sections 20 and 21 of the Partnership Act, 1890."

Here there was an express agreement and, although it does not deal expressly with the particular point, I have given my reasons for concluding that it does refer to this trade mark in terms, and in a context, which lead to the conclusion that this trade mark did not become the property of the firm. If I am wrong in concluding that the agreement disposes of the matter, the three considerations which the learned author proposes lead to the same conclusion. So far as the evidence is concerned, there is nothing to show that registration of this trade mark, to which the respondent alone was entitled prior to the agreement, was not obtained solely at his expense. A heavy onus lies on a litigant who claims to have a statutory register of this kind amended and, if evidence to the contrary existed, it would surely have been produced. The purpose for which registration was obtained, extends to a wider field than that in which the partnership was trading. Finally, the conduct of the parties in respect of the application for registration and the notice calling for objections shows that they have dealt with this trade mark, or at least conducted themselves in regard to it, in a manner which is inconsistent with it being partnership property.

For these reasons, in my judgment, the claim for rectification of the register was properly disallowed, and I would dismiss this appeal with costs.

Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; Lim, Lim & Oon.*

CHACKO & ORS. v. ARMY CIVIL SERVICES UNION

[O.C.J. (Kulasekaram J.) May 13, 1964]

[Singapore — Originating Summons No. 162 of 1963]

Trade Union — Stricking off of members for non-payment of levy — Levy imposed by executive council without prior secret ballot of members — Whether action of executive council ultra vires — Exhaustion of domestic remedies — Whether court will grant declaration if domestic remedies not exhausted.

The executive council of the Army Civil Services Union imposed a levy on members of the union. The plaintiffs were some of the members of the union who refused to pay the levy and they were subsequently struck off the register of membership of the union. They applied to court for an order that the executive council had no power to impose a levy upon the members of the union without a prior secret ballot of the members and that the levy imposed was wrongful, *ultra vires* and void. It was argued that as there was provision in the rules of the union for an appeal to the annual delegates conference, the plaintiffs had a domestic remedy which they should

have exhausted before applying to the court. It was also argued that the executive council had a right to impose the levy after taking a secret ballot of members of the council.

Held: (1) the plaintiffs were justified in applying to the court for a declaration that the executive council in striking them off the register of members was acting *ultra vires* the rules of the union;

(2) the executive council had no power to impose a levy upon members of the union without a prior secret ballot of the members of the union and therefore the levy imposed was wrongful, *ultra vires* and void;

(3) the striking off of the plaintiffs from the register of membership of the union for non-payment of the levy was *ultra vires* and void.

Cases referred to:—

(1) *Tharmalingam* v. *Sambanthan* [1961] M.L.J. 63.

(2) *Bonsor* v. *Musicians' Union* [1954] 1 All E.R. 823.

ORIGINATING SUMMONS.

L. A. J. Smith for the plaintiffs.

J. B. Jeyaretnam for the defendants.

Cur. Adv. Vult.

Kulasekaram J.: The executive council of the Army Civil Services Union imposed a levy on the members of the union acting under the provisions of rule 23 sub-rule (a) of the Rules and Regulations Army Civil Service Union which I shall set out later.

The plaintiffs are some of the members who refused to pay the levy and were subsequently struck off the register of membership in accordance with rule 27 of the Rules and Regulations of the Army Civil Service Union.

The plaintiffs have now applied to this court for an order:—

(1) that on a proper construction of rules 23(a) and 27(a) and other rules relevant to the interpretation and construction of the said rules the executive council of 1962 have no power to impose a levy upon the members of the defendant union without a prior secret ballot.

(2) that the levy imposed by Army Civil Services Union News Bulletin Vol. 5 dated October 1962 was wrongful, *ultra vires* and void.

The following facts have been agreed:—

(1) A levy was imposed.

(2) The plaintiffs did not pay the levy.

(3) The plaintiffs were struck off the register of membership under rule 27(a) of Army Civil Service Union for being in arrears with their subscriptions in that they did not pay the levy.

(4) The secret ballot which took place was solely by members of the executive council and not from any other members of the union.

(5) No general meeting of the union was called.

The first question that has to be decided is whether the plaintiffs are right in making this application or more correctly will this court entertain such an application.

Counsel for the defendants submitted that the plaintiffs should not seek the aid of this court until they have exhausted their internal or domestic remedies to put right this situation. Counsel for the defendants urged that the plaintiffs should have proceeded under rule 9 sub-rule (h) of the Rules and Regulations of the Army Civil Service Union which is as follows:—

"The executive council may fine any member who is proved to the satisfaction of the council to have been guilty of conduct prejudicial to the interests of the union, a sum not exceeding $10 or may expel such member from the union. Any member so fined or expelled shall have the right of appeal to the annual delegates conference whose decision shall be final."

Counsel for the plaintiffs submitted in answer to this that this rule has no application as the plaintiffs have not been expelled from the union but have merely been struck off the register of membership a fact which is not in dispute.

Though the third prayer in this application refers to expulsion, at the hearing in accordance with the agreed facts the parties agreed that this was not a case of expulsion but one of being struck off the register of membership.

In the circumstances I agree with the submission of the counsel for the plaintiffs that rule 9 sub-rule (h) of the Rules and Regulations of Army Civil Service Union has no application in this case.

Counsel for the defendants relied further on rule 9 sub-rule (i) which reads as follows:—

"Between meetings of the annual delegates conferences, the executive council shall interpret the rules, when necessary, and determine any point on which the rules are silent."

read in conjunction with rule 5 sub-rule (a) which reads as follows:—

"The supreme authority of the union shall be vested in the annual delegates conference and subject to that authority the union shall be governed by the executive council."

and said that under those provisions there is a domestic remedy which the plaintiffs should have exhausted before coming to this court. Counsel for the defendants submitted that this is the rule as laid down in *Tharmalingam* v. *Sambanthan.*[1]

I am of the view that the present case can be distinguished from that case. In that case the domestic remedy was clearly provided for in very specific terms. If in the present case the plaintiffs had been expelled under rule 9 sub-rule (h) of the Rules and Regulations of the Army Civil

Service Union, then there is a clear domestic procedure there for obtaining relief.

In this case however it is arguable whether there is any domestic remedy. What the plaintiffs seek here is a declaration that the act of the executive council of the union is *ultra vires* the powers conferred on it by the Rules and Regulations of the union.

I am of the opinion that the plaintiffs are justified in making this application before this court.

The remarks of Sir Raymond Evershed, M.R. in *Bonsor* v. *Musicians' Union* [2] are very pertinent here:

"It is true that the plaintiff did not take advantage of his right of appeal under the rules but I cannot see how that affects the plaintiffs' right to come to this court and say that the purported expulsion was *ultra vires* the rules and ineffective."

Having disposed of this point I come to the question of the levy imposed by the executive council of the union.

Let me first of all set out rule 23 of the Rules and Regulations of the union which relates to levies:—

"(a) The executive council may, by a two third majority votes after secret ballot of members as laid down in rule 19(d) if they consider it necessary, impose a levy upon all members of the union and all members shall be required to pay such levy. The levies shall be collected by the branch treasurers and forwarded to the HQ Union.

(b) A branch committee may, if they consider it necessary and with the consent of the executive council and by secret ballot of members of that branch, impose a levy upon all members of the branch and all members of the branch shall be required to pay such levy.

(c) If any member fails to pay a levy within eight weeks of its imposition the amount shall be treated as arrears of subscription.

(d) Members who refuse to pay an imposed levy and who are subsequently struck off the register as having been in arrears of subscription shall not be re-enrolled as a member unless the member pays the previously imposed levy in full.

(e) The names of all members who are struck off the register under sub para (d) above shall be notified to the Union HQ by the respective branch treasurers within 10 days of taking such an action. A special register for this purpose shall be maintained by the Union HQ."

and rule 27 of the same Rules and Regulations regarding arrears:—

"(a) Any member who is in arrears with his subscriptions for two months shall be given notice in writing to pay such arrears within one month from the date of receipt of notice, failing which he shall be struck off the register of membership without further notice.

(b) Once a notice has been sent by registered post to a member's last registered address or delivered by hand it shall be deemed to have been duly served."

It might also be convenient here to set out rule 19 sub-rule (d) regarding secret ballot:—

"Voting shall be by secret ballot in the following cases:—

(d) In the case of dissolution, and any other matter affecting the members of the union generally."

Counsel for the defendants submitted that under rule 23 sub-rule (a), which I have set out above, the executive council of the union can impose a levy upon all members of the union even without taking a secret ballot. If however the executive council decides to take a secret ballot, which he said is purely discretionary upon the executive council, then they need only take a secret ballot of the members of the executive council and not of all members of the union.

In my view I find it difficult to agree with the above submission. On a proper construction of this sub-rule it would appear that the executive council of the union may impose a levy on all the members of the union but before so doing it is obligatory on them to take a secret ballot of the members as laid down in rule 19 sub-rule (d).

The taking of the secret ballot is a condition precedent before the imposition of a levy.

The next question that has to be decided is whether it should be a secret ballot of the members of the executive council of the union or a secret ballot of the members of the union.

There is some ambiguity here and to resolve it some assistance could be had from the provisions of the next sub-rule, *viz.* rule 23 sub-rule (b).

Here a branch committee can impose a levy, if it considers it necessary, with the consent of the executive council of the union, but they must also take a secret ballot of the members of the branch before imposing the levy. The mere consent of the executive council of the union is not good enough even to impose a levy on a branch.

That being so I take the view that the secret ballot contemplated in rule 23 sub-rule (a) is one of the members of the union and not of the members of the executive council of the union.

I would further say that in the Rules and Regulations of the union wherever there is reference to rule 19 sub-rule (d) the secret ballot contemplated is one of the members of the union and not of the members of the executive council. I refer in particular to rule 30 sub-rule (a) and rule 9 sub-rule (j) of the Rules and Regulations of the union.

In the result the plaintiffs must succeed in this application and there shall be an order in the following terms:—

(1) the executive council of 1962 of the Army Civil Service Union had no power to impose a levy upon the members of the Army Civil

Service Union without a prior secret ballot of the members of the union.

(2) that the levy imposed by Army Civil Service Union News Bulletin Vol. 5 dated October 1962 was wrongful, *ultra vires* and void.

(3) that the striking off of the plaintiffs from the register of membership of the Army Civil Service Union for non-payment of the levy was *ultra vires* and void.

Order in terms.

Solicitors: *L. A. J. Smith*; *David Marshall.*

TANG SUI ING v. GOH TIEW LIONG

[O.C.J. (McGilligan J.) May 20, 1964]

[Sibu — Matrimonial Cause No. M/13 of 1964]

Husband and wife — Divorce — Foochow Custom in Sibu — Failure to maintain — Custody of children.

In this case the petitioner asks for dissolution of her marriage on the grounds of desertion, cruelty, failure to maintain and on the general ground that the circumstances which have arisen made it just and reasonable that the marriage should be dissolved. The evidence of the headman was that a marriage contracted under Foochow Chinese custom may be dissolved if —

(1) there is a complete and absolute desertion by one party or the other for at least two years; or

(2) there is absolute failure on the part of the husband to maintain the wife or children for at least two years; or

(3) the parties are completely out of sympathy with each other, are incompatible, find it impossible, despite genuine efforts, to live reasonably together as man and wife.

Held: on the facts, that the husband had failed to maintain his wife and his children for more than two years and therefore the wife was entitled to a decree for dissolution of the marriage and the custody of children.

PETITION FOR DIVORCE.

Madam Lee Wee Gek for the petitioner.

Respondent in person.

Cur. Adv. Vult.

McGilligan J.: The parties were married according to Foochow custom in Sibu on the 28th of August 1959, and on that date the marriage was duly registered under the Chinese Marriage Ordinance. There have been three children of the marriage: Kok Bee Yii, a girl, now aged four, Tan Sing Chiong, a boy, now aged two and a half, and Kok Bee Ee, a girl, now aged about six months.

The petitioner, the wife, asks for dissolution of the marriage on the grounds of desertion, cruelty, failure to maintain and on a general ground that the circumstances which have arisen make it just and reasonable that the marriage should be dissolved.

The court has had the benefit of the most useful and illuminating evidence of Mr. Ting Lik Hung, a Foochow Chinese Headman in Sibu for very many years, and a very well-known figure in the Foochow community and in the general community. The court fully accepts him as an expert on Foochow Chinese custom and accepts his evidence as correctly stating the rules and principles of that custom concerning divorce.

According to Mr. Ting Lik Hung a marriage contracted under Foochow Chinese custom may be dissolved if

(1) there is a complete and absolute desertion by one party or the other for at least two years, or

(2) there is an absolute failure on the part of the husband to maintain the wife or the children for at least two years, or

(3) the parties are completely out of sympathy with each other, are incompatible, irreconcilable, find it impossible, despite genuine efforts, to live reasonably together as man and wife.

Mr. Ting did not give evidence, as to whether cruelty may be a ground for divorce, and there are no decided cases in which it has been held that cruelty is a ground for dissolution of a marriage contracted under Foochow custom.

In any event the petitioner has failed to prove anything that could be called cruelty. There were, I am sure, quarrels and fights between the two of them, and I believe the respondent did sometimes slap the petitioner, and even sometimes beat her lightly; but the worst thing he did (even giving the petitioner fullest credence on this) was once to give her a push which made her fall. This was a rough and thoughtless and nasty thing to do to a woman five months pregnant, but it was only bad luck that the fall resulted in a miscarriage. Even if the push were to be regarded as cruelty it was fully condoned later by the petitioner; she went on living with the respondent, and had another child by him. The other evidence on this point falls far short of proving any kind of cruelty.

The petitioner has also failed to prove desertion for anything like two years, because by her own account she and the respondent went on living together until the 3rd of August 1963.

However, the petitioner has in my judgment succeeded in establishing failure to maintain her (and the children alive during the period) for more than two years. I found her father a most believable witness; he gave his evidence very frankly, and exhibited just that degree of indignation one would have expected in the circumstances. There was also the very strong evidence of Mr. Ting Lik Hung that the petitioner made to him, as Headman, at least 10 complaints, over the two years, of the respondent's neglecting to